

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Reexamination of Roaming Obligations of)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers)	
and Other Providers of Mobile Data Services)	

To: The Commission

REPLY TO OPPOSITION

Blanca Telephone Company (“BTC”), by its attorneys, and pursuant to Section 1.429 of the Commission’s Rules (“Rules”),¹ hereby replies to an opposition filed by AT&T Inc. (“AT&T”)² in response to a petition filed by BTC³ requesting that the Commission reconsider its *Second Report and Order* in the above captioned proceeding.⁴

Appropriateness of a Time Limit for Negotiations

AT&T asserts that the establishment of a single time limit for negotiations between a carrier requesting data roaming arrangements (“Requesting Carrier”) and a carrier from which roaming is sought (“Host Carrier”) would not be appropriate because the complexity and fact-intensive nature of some data roaming negotiations may require more time,⁵ and because protec-

¹ 47 C.F.R. § 1.429.

² Opposition of AT&T to Petition for Reconsideration, WT Docket No. 05-265 (filed Dec. 16, 2011) (“AT&T Opposition”).

³ BTC, Petition for Reconsideration (filed June 6, 2011) (“Petition”). See *Petition for Reconsideration of Action in Rulemaking Proceeding*, FCC Public Notice, Report No. 2938 (rel. Nov. 21, 2011).

⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411 (2011) (“*Second Report and Order*” or “*Order*”), appeal docketed, *Cellco Partnership v. FCC*, Case No. 11-1135 (D.C. Cir. May 13, 2011).

⁵ AT&T Opposition at 1-2 (citing *Second Report and Order*, 26 FCC Rcd at 5451-52 (para. 84)).

tions established by the Commission in the *Second Report and Order* will ensure that negotiations “proceed at a pace that is appropriate to the particular circumstances.”⁶

AT&T makes no attempt, however, to document the extent to which roaming arrangements would in fact prove to be so complex and so fact-intensive that a single “shot clock” for negotiations, as advocated by BTC and supported by parties commenting on the Petition,⁷ would be inappropriate. Given the utility of a shot clock in facilitating negotiations and therefore ensuring that small, rural, and mid-tier carriers have timely access to roaming on the networks of larger nationwide carriers,⁸ AT&T’s failure to support its claims regarding the nature of roaming negotiations is a glaring omission. In fact, as the Joint Parties explain, the Commission’s concern regarding complex and fact-intensive negotiations—which is mirrored in AT&T’s Opposition—“is misguided given the current state of development of roaming arrangements, especially with the largest carriers.”⁹

⁶ *Id.* at 2.

⁷ MetroPCS Communications, Inc., NTELOS Holdings Corp., PR Wireless, Inc., Revol Wireless, National Telecommunications Cooperative Association, Rural Cellular Association, Rural Telecommunications Group, United States Cellular Corporation, Comments in Support of the Blanca Telephone Company Petition for Reconsideration, WT Docket No. 05-265 (filed Dec. 16, 2011) (“Joint Parties Comments”); NTCH, Inc., Comments in Support of Petition, WT Docket No. 05-265 (filed Dec. 16, 2011) (“NTCH Comments”).

⁸ *See, e.g.*, Petition at 5-6, 8; Joint Parties Comments at 10-13 (explaining that shot clocks are an effective tool in fostering negotiations in cases where the parties have unequal bargaining power); NTCH Comments at 1-2.

⁹ Joint Parties Comments at 5 n.14. The Joint Parties explain that:

The voice roaming market has evolved to the point where certain forms of voice roaming agreements are widely used throughout the industry. And now, these agreements have been adapted to 2G and 3G data roaming. This means that many of the technical issues raised in the early stages of the data roaming debate have been addressed as data agreements have started to emerge. 4G roaming agreements are less prevalent and present some additional issues at this time, but such arrangements would be built on already existing frameworks and should be able to be resolved in a relatively short time frame.

Id.

Moreover, AT&T's reliance on the "ample protections built into the new data roaming mandate"¹⁰ is unfounded. In contrast to the mechanisms AT&T describes, a shot clock is a concrete requirement that would drive Host Carriers to engage in serious and timely bargaining, and that would serve to offset "[t]he core problem . . . [that] there is a complete lack of equal bargaining power at the data roaming negotiating table and every incentive for the largest carriers to delay roaming negotiations in order to gain a competitive advantage."¹¹

The consequences of this imbalance in bargaining power between the two largest national carriers and small, rural, and mid-tier carriers has been underscored by events surrounding the recent collapse of AT&T's efforts to acquire T-Mobile USA, Inc. ("T-Mobile"). According to recent press reports, the failure of the companies to obtain regulatory approval has triggered "roaming concessions that [AT&T] pledged to give T-Mobile in its original roaming agreement . . . [involving] roaming rights on AT&T's 3G network."¹² Thus, T-Mobile—a major national carrier—was apparently unsuccessful in obtaining a satisfactory data roaming agreement on reasonable terms and conditions with AT&T, except in the context of a merger agreement. This intransigence regarding roaming negotiations is magnified in the dealings of the largest national carriers with small, rural, and mid-tier carriers, where the imbalance of market power is considerably greater.¹³

¹⁰ AT&T Opposition at 2.

¹¹ Joint Parties Comments at 6.

¹² Elizabeth Woyke, *With Deal Dead, Attention Turns to AT&T/T-Mobile Roaming Agreement*, FORBES, Dec. 19, 2011, accessed at <http://www.forbes.com/sites/elizabethwoyke/2011/12/19/with-acquisition-deal-dead-attention-turns-to-att-mobile-roaming-agreement/>.

¹³ T-Mobile itself has discussed the problems associated with obtaining roaming agreements from the two largest national carriers:

AT&T and Verizon assert that an automatic data roaming obligation is not required because the market is functioning properly. The market may be functioning for AT&T and Verizon, but it is not functioning for many other carriers and their customers—particularly carriers that are unable to negotiate roaming agreements on reasonable terms and conditions with Verizon and AT&T.

Finally, AT&T's representations concerning the supposed effectiveness of protections in the *Second Report and Order* are contradicted by the facts. The Joint Parties present numerous examples in which roaming negotiations with the largest national carriers have been plagued by inordinate delays, illustrating the fact that "the admonitions regarding prompt negotiations contained in the *Second Report and Order* are not being taken seriously by the largest national carriers."¹⁴ The Joint Parties conclude that "one reason for this attitude is that there is nothing in the data roaming rule itself that requires the roaming carrier to negotiate in good faith or to conclude negotiations according to any specific timetable."¹⁵

AT&T's Procedural Argument

AT&T asserts that the Petition is "procedurally defective" under Section 1.429 of the Commission's Rules because it "rel[ies] solely 'on arguments that have been fully considered and rejected by the Commission in the same proceeding.'"¹⁶ AT&T misreads Section 1.429 and its application to the Petition.

A principal argument raised by BTC in its Petition involves a challenge to the Commission's conclusion in the *Second Report and Order* "that an across-the-board negotiation deadline requirement would not be workable because some negotiations would likely require more time,

T-Mobile Reply Comments, WT Docket No. 05-265 (filed July 12, 2010), at 12. *See* Letter from Kathleen O'Brien Ham to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed Nov. 30, 2009), at 5 (indicating that "T-Mobile's experience since 2007 strongly suggests that, without the changes it seeks, roaming not covered by the existing automatic roaming rule will not be provided at reasonable rates, terms, and conditions, or may be withheld altogether, diminishing competition at the retail level and harming consumers"), *quoted in Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 4210 (para. 58 n.172) (2010) ("*Second Further Notice*").

¹⁴ Joint Parties Comments at 8.

¹⁵ *Id.*

¹⁶ AT&T Opposition at 3 (quoting 47 C.F.R. § 1.429(l)(3)). Section 1.429(l) provides that the relevant bureau or office may dismiss or deny a petition for reconsideration "that plainly [does] not warrant consideration by the Commission and which do not meet the requirements of paragraphs (b)(1) through (b)(3) of [Section 1.249]." Reliance on arguments already considered and rejected by the Commission is an example, listed in Section 1.429(l), of a basis for dismissal or denial of a petition by a bureau or office.

and because allegations of undue delay could be addressed on a case-by-case basis.”¹⁷ BTC presents arguments in the Petition in support of its view that the Commission’s reasoning is not persuasive in claiming that some negotiations may be so complex or fact-intensive that a negotiation deadline would be inappropriate.¹⁸

The arguments raised by BTC in its Petition were not previously “fully considered and rejected by the Commission within the same proceeding[.]”¹⁹ because parties supporting a shot clock mechanism did not raise the arguments presented by BTC, nor could they have been expected to, since the Commission first discussed its concerns regarding complex or fact-intensive negotiations in the *Order*.²⁰ Thus, AT&T is incorrect in its claims regarding the arguments upon which the Petition relies, since the Commission has not previously considered and rejected these arguments.

BTC’s arguments concerning the Commission’s rationale for its refusal to adopt a shot clock rule are also permissible pursuant to Section 1.429(b) of the Commission’s Rules. This paragraph provides that a petition for reconsideration relying on arguments that have not previously been presented to the Commission “will be granted” only under specific circumstances.

One such circumstance is that the “arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to

¹⁷ Petition at 5 (footnote omitted) (citing *Second Report and Order*, 26 FCC Rcd at 5451-52 (para. 84)).

¹⁸ *Id.* at 7.

¹⁹ 47 C.F.R. § 1.429(l)(3).

²⁰ Although the Commission raised several specific questions related to mobile broadband and data roaming agreements in the *Second Further Notice* in this proceeding, including issues relating to dispute resolution, *Second Further Notice*, 25 FCC Rcd at 4223 (para. 91), the Commission did not propose, seek comment on, or otherwise discuss the advantages or disadvantages of adopting a single time limit for negotiations between Requesting Carriers and Host Carriers.

the Commission”²¹ A second circumstance is that the “arguments relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the . . . arguments in question prior to such opportunity”²²

Either one of these circumstances provides a further basis for rejecting AT&T’s assertion that the Petition is “procedurally defective.” BTC could not have presented its arguments concerning the deficiencies in the Commission’s rationale for its rejection of a shot clock rule prior to the issuance of the *Second Report and Order* because the rationale had its genesis in the *Order*. BTC could not have “known” or formulated these arguments in comments or reply comments prior to the issuance of the *Order* because no “exercise of ordinary diligence” could have anticipated the Commission’s presentation of the rationale in the *Order*.

Finally, BTC raises several additional arguments in its Petition that were not previously presented to the Commission, but the Commission should nonetheless determine that its consideration of these arguments “is required in the public interest.”²³

The Commission’s invocation of the public interest provisions of Section 1.429(b)(3) as a basis for considering the arguments raised in the Petition can be grounded in the fact that, since the adoption of the *Second Report and Order*, compelling evidence has emerged demonstrating that the patterns of delay and obstruction followed by the largest national carriers as a means of foiling attempts by small, rural, and mid-tier carriers to enter into data roaming agreements have continued unabated. In short, the mechanisms adopted in the *Order* to help facilitate negotiations and roaming agreements are not having their desired effect.

²¹ 47 C.F.R. § 1.429(b)(1).

²² 47 C.F.R. § 1.429(b)(2).

²³ 47 C.F.R. § 1.429(b)(3).

As noted earlier, the Joint Parties have provided numerous examples in support of their conclusion that the Commission's attempts in the *Second Report and Order* to promote prompt negotiations are simply being ignored by the largest national carriers. Negotiations that languish for more than two years; long delays before receiving initial responses from Host Carriers; one-sided proposals from Host Carriers that cause even greater delays; unreasonable requests from Host Carriers for detailed, long-term traffic projections; indeterminate delays in testing by the Host Carriers²⁴—these are some of the examples presented by the Joint Parties supporting their conclusion that “the Commission must put teeth into its effort to discourage stonewalling by requiring Host Carriers to meet reasonable deadlines in the course of fulfilling their obligation to provide data roaming service on commercially reasonable terms and conditions.”²⁵

Given these ongoing practices of the largest national carriers, which have continued since adoption of the *Second Report and Order*, it would be in the public interest for the Commission to review the additional arguments raised by BTC, and to reconsider its refusal to adopt a shot clock as a means of ensuring timely negotiations.

In its Petition, BTC points to factors that give the national carriers disproportionate bargaining power in data roaming negotiations, including their substantial market power,²⁶ and emphasizes that the Commission itself has pointed to a “serious risk [that the national carriers] might halt the negotiations of roaming on their advanced mobile data networks altogether in the future in the absence of Commission oversight, harming competition and consumers.”²⁷ BTC argues that adopting a time limit for data roaming negotiations “would be advantageous, and

²⁴ Joint Parties Comments at 7-8.

²⁵ *Id.* at 9-10.

²⁶ Petition at 6-7.

²⁷ *Second Report and Order*, 26 FCC Rcd at 5427 (para. 27) (footnote omitted), *quoted in* Petition at 4.

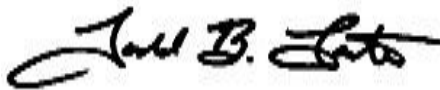
would further the Commission's public interest goals, because it would provide a practical means of addressing a central reality of the mobile wireless marketplace," namely, the mismatch in bargaining power between Requesting Carriers and the large national Host Carriers.²⁸

BTC urges the Commission to consider these arguments raised in the Petition. Doing so not only would be consistent with the Section 1.429(b)(3) public interest provisions, but would also assist the Commission in crystallizing a hard fact: If the Commission is committed to achieving the data roaming objectives reflected in the *Second Report and Order*, then the Commission must acknowledge that the largest national carriers are undermining these objectives, and must therefore reconsider its decision in the *Order* and impose a time limit for negotiations as a means of "putting teeth" in its mandate for timely negotiations.

Conclusion

AT&T fails to present any substantive or procedural grounds for the Commission to dismiss or deny the Petition. BTC therefore respectfully renews its request that the Commission should adopt a time limit applicable to all data roaming negotiations that are subject to the provisions of the *Second Report and Order*.

Respectfully submitted,



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²⁸ Petition at 5-6.

CERTIFICATE OF SERVICE

I, Donna L. Brown, do hereby certify that on this 27th day of December, 2011, I caused a copy of the foregoing REPLY TO OPPOSITION to be served on the following via First-Class Mail, postage pre-paid:

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